U.S. Department of Labor

Office of Administrative Law Judges
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DATE: MAY 4, 2000

CASE NO.:1999-LHC-1198

OWCP NO.: 07-135183

IN THE MATTER OF

JERRY KATE BAZOR, Widow of
BEN BAZOR
Claimant

v.

BOOMTOWN BELLE CASINO
Employer

and

LOUISIANA WORKERS' COMPENSATION CORP.
Carrier

and

GREAT WEST LIFE & ANNUITY
INSURANCE CO.,
Intervenor

APPEARANCES:

Marcus J. Poulliard, Esq.
For the Claimant

David K. Johnson, Esq.
For Employer/Carrier

Elizabeth S. Wheeler, Esq.
For Intervenor

BEFORE: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et. seq., brought by Jerry Kate Bazor, widow of Ben Bazor (Claimant) against Boomtown Belle Casino (Employer) and Louisiana Worker's Compensation Corporation (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held in New Orleans, Louisiana on January 26, 2000.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Testifying on behalf of Claimant were Delores Bazor McNutt, Delaina Bazor Moreau, Quincy Wade Moreau and Jerry K .Smith Moreau. Claimant introduced 23 exhibits including: Claimant's wage and tax returns for 1990 through 1994; newspaper articles concerning Employer; photographs of the dock/tent area where Claimant worked; discovery responses; Claimant's medical records from West Jefferson Hospital; an ambulance run sheet; Claimant's death certificate and funeral expenses; Claimant's marriage license; and depositions from Robert Creighton, Reynold Gaspard, John Dicken, Russell Chatelain, Dr. C.B. Scrignar, Peter Banks, Somtop Pichakron and Dr. David C. Tong.[1]

Employer called Russell Chatelain, Robert A. Creighton, Reynold J. Gaspard and Shannon Williams Blue and introduced the following 3 exhibits: form LS-203 (Claimant's Claim for Compensation) dated November 28, 1994; Claimant's payroll, personnel and wage information with Employer and medical records of Claimant from West Jefferson Hospital. Intervenor introduced 53 exhibits including: Employer's health and welfare plan, service agreement between Intervenor and the plan; itemized statement of expenses for Claimant, bills relating to the plan's payments to Abbey Home Healthcare, Dr. Anthony Albright, anesthesiology & Pain Management, Inc.; Apria Health Care, Dr. Raymond Baez, Dr. Thor Borresen, Dr. Francisco Candal, Care Ambulance Service, Jill Chorba, PA, Dr. Frank Culicchia, Emergency Physicians, Susan Estrada, Dr.Diana Gilimore, Dr. Gary Glynn, Dr. Christy Graves, Greenery Horizons, Dr. Thomas Irwin, Jr., Jayachandra Indru, Jefferson Radiology, JoEllen Smith Medical Center, Dr. Howard Katz, Dr. Edmund Kerut, Dr. John Kimble, Dr. John Less, Long Term Acute Care, Thomas McCaffrey, Dr. Marcello Mora, M.S. Home Infusion, Northlake Radiology, Northshore Regional Medical Center, Dr. Stephen Orville, Pearl River County Nursing Home, Priority EMS, Professional Radiology, Puckett Laboratory, Dr. Michael Reed, Rhema Medical Equipment, River Region Home Health, Jacob Sassone, Dr. Hans Schuller, Dr. Richard Schunior, Slidell Memorial Hospital, Smithkline Beecham, Dr. Paul Staab, Dr. Rian Tanenbaum, Taylor Home Health, Dr. Walter Truax, Dr. Steve Venturatos, West Jefferson Medical Center, and an affidavit from Patricia Fry.

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[1] References to the transcript and exhibits are as follows: trial transcript-Tr.___; Claimant's exhibits- CX-___p.___; Employer exhibits- EX-___p.___; Intervenor exhibits-IX-___p.___.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on July 13, 1994.

2. The injury occurred during the course and scope of Claimant's employment.

3. An employer/employee relationship existed at the time of the injury.

4. Employer was advised of the injury on July 13, 1994.

5. Employer filed a Notice of Controversion on December 13, 1994.

6. An informal conference was held on June 27, 1998.

7. Claimant's average weekly wage was $653.85.

8. Employer/Carrier paid no medical benefits. Intervenor paid medical benefits amounting to $606,306.64.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Jurisdiction or coverage under the Act.

2. Causation of injury.

3. Nature and extent of injury.

4. Payment of medical bills by Employer.

5. Intervenor's right to recover medical benefits paid on behalf of Claimant.

6. Penalties, interest and attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology:

Many of the facts concerning Claimant's work history and employment with Employer were uncontested. The records show Claimant, who was born on June 2, 1940, to have a high school education followed by 4 years of service in the U.S. Navy. On September 27, 1962 he married Jerry Kate Smith and had two children, Delores Bazor McNutt and Delaina Bazor Moreau. (Tr. 28, 41,42 54-56).

Prior to his employment with Employer, Claimant had an extensive background in refrigeration and appliance repair with state refrigeration and gas fitter licenses. From 1962 to 1969, Claimant worked as a service supervisor for Sears and Roebuck, supervising 45 employees in refrigeration and appliance repair. This was followed by similar work at Montgomery Ward from 1970 to 1971, after which he was employed by Taylor Diving and Salvage from 1971 to 1980 as a refrigeration shop foreman supervising 10 employees in air conditioning and heating system maintenance, along with the fabrication and maintenance of environmental control systems for diving chambers. From 1980 to 1989 he operated his own air condition and appliance business followed by employment with Pool Offshore Company from 1989 to 1992, where he worked as an electrician, air conditioning and heating repair person servicing appliances, gas detection, alarm , P.A. systems on offshore drilling rigs. From September 1992 to June 1994, he worked for Casino Magic in Bay St. Louis, Mississippi, as a shift maintenance supervisor. (CX-8, pp. 44, 45; Tr. 56-58).

On June 9, 1994, Employer hired Claimant as a facilities manager on the recommendation of Russell Chatelain, Director of Purchasing, who in turn reported to General Manager, Jay Rabalais. (CX-18, pp.7-9; Tr. 59). [2] Supervisors and employees regarded Claimant as extremely conscientious fair and honest in his dealings with others. (Tr.59,60). Claimant was responsible for starting up and hiring the maintenance and housekeeping departments and getting Employer's facilities ready for business. (Tr. 109). When Claimant was hired the facilities included a boat which was under construction at Avondale's Westwego shipbuilding yard; a parking lot and large tent located about 50 feet from the Harvey Canal off ; an adjacent dock and office building under construction; a warehouse and office at 3008 Engineers Road with additional office space in an adjacent red brick building and another warehouse in Terrytown.[3] (Tr. 112, 113; CX-18, p. 22; CX-20, p. 48). The tent served as a temporary shelter to house casino patrons as they were waiting to board the casino vessel with bathrooms and a employee cafeteria. It was replaced in December, 1994, by a permanent office building built by Grimaldi, an independent contractor. (Tr.146, 147).

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[2] The facilities manager position was later changed to Facilities Director, a position currently held by Robert Allen Creighton. (CX-15, Tr. 109).

[3] Witnesses provided several estimates of the distance between the tent and the waters edge ranging from 50 feet, (Tr. 64-66; CX-3), to 300-350 feet. (Tr.134).

As facilities manager, Claimant hired housekeeping manager, Robert Allen Creighton on June 21, 1994. Creighton in turn was responsible for all housekeeping and janitorial services for Employer which included routine housekeeping assignment such as cleaning, mopping and dusting on the vessel as well as the offices and warehouses. (Tr. 117-119, 134, 135). Creighton interviewed and Claimant hired housekeeping personnel. Claimant was also responsible for ordering housekeeping supplies. (Tr. 131, 132, 142, 143). Creighton currently holds the position of facilities director, a position to which he was appointed in late 1995. (Tr. 135).

Claimant was also responsible for hiring maintenance personnel and ordering supplies for that department. In June, 1994, Claimant hired the following maintenance personnel: Peter J. Banks (Maintenance Supervisor), Reynold Joseph Gaspard, Somtop "Tip" Pichakron, Reynolds, Gill Thompson, and Jim Mantie. (Tr. 160 , CX-20, pp. 18-20; CX-21, p. 6). Besides hiring and staffing the maintenance department, Claimant was also responsible for cleaning up and repairing the Casino vessel prior to delivery. (Tr. 125). In addition, he was also responsible for the installation and wiring of slot machines prior to delivery, because Avondale was behind schedule in the ship construction, which Employer found to be of poor quality. The casino vessel was originally scheduled for delivery and operation on July 4, 1994. However, the casino had to delay opening until August 6, 1994. (CX-2; Tr. 126-128).

Indeed, it was because of poor workmanship and delays in construction that forced Claimant to use his housekeeping staff to clean the vessel, while Claimant employed his maintenance staff to work considerable hours of overtime installing and wiring slot machines. (Tr. 114). Claimant worked up to 15 hours per day, from July 5 to his stroke, while supervising a maintenance crew that put in 10 to 12 hour days making sure that the Casino vessel was properly outfitted with properly wired slot machines. (Tr. 168, 169, 176) (CX-20, pp. 21-23). Creighton even had to put in 50 to 60 hour weeks from June 21 to July 13, 1994 working 6 days a week. (Tr. 137, 138).

Avondale's poor performance caused Employer considerable concern and stress, because every day the opening was delayed Employer lost considerable revenue. (Tr. 126-129). During the afternoon of July 13, 1994, between 3 p.m. and 6 p.m.., Claimant, while sitting in a chair in the tent collapsed and fell to the ground unconscious. Employer had Claimant taken by ambulance to West Jefferson Hospital, where he was treated and diagnosed with a aneurysmal subarachnoid hemorrhage secondary to a MCA aneurysm. On the same date, Claimant underwent a right frontal temporal craniectomy, clipping of middle cerebral bifurcation aneurysm, evacuation of intracerebral hemorrhage, and anterior temporal lobectomy. (CX-11,12).

Claimant remained at West Jefferson Hospital until October 1994, when he was transferred to Greenery Neurological Center in Slidell where he remained until March 1995. He was readmitted to Slidell Memorial Hospital on March 5, 1995 and was discharged on March 31, 1995. He remained at his daughter's home in Marrero from March 31, 1995 to October 5, 1995 where he received 24 hour care from nurse and family members undergoing 80 hyperbaric treatments. When family members could no longer provide the necessary car, Claimant was transferred on October 5, 1995 he was transferred to Pearl River County Hospital and Nursing Home where he remained until his death on October 2, 1997. (CX-10). From the moment of his stroke and initial collapse until his death Claimant never regained consciousness. (CX-3 , CX-19, pp.76). Claimant's death certificate listed the immediate cause of death as cardioresspiratory failure due to pneumonia.

(CX-13). [4]

Claimant's medical bills were paid for by Intevenor pursuant to a health and welfare policy which Claimant applied for and accepted when hired. A summary of the plan and service agreement were listed as EX-1 and 2 were attached to IX-53. A detailed list of the medicals paid Claimant amounting to $606,306.64 were provided. Claimant's funeral bills consisted on a monument bill of $,1840.00 and burial expenses of $5,552.50. (CX-14).

B. Testimony of Jerry Kate Bazor (Claimant's Widow):

Jerry Kate Bazor's, (Ms. Bazor) testimony dealt primarily with Claimant's character, work history and job responsibilities with Employer and the pressures and stress caused by his employment with Employer.[5] Ms. Bazor described her marriage to Claimant resulting in two daughters, (Delores Bazor McNutt and Delaina Bazor Moreau) and 5 grandchildren and detailed his work history prior to Employer as noted above. (Tr. 54-59). She described her husband as a good family man, honest, a perfectionist about work, fair treatment of fellow workers and a person with an easy going personality not prone to complain. (Tr. 59-61).

Ms. Bazor testified that Claimant was hired to be in charge of all land based and marine vessel repairs and maintenance including housekeeping and ground facilities. (Tr. 62-67, 72-75). The maintenance duties included repair of air conditioning and heating equipment, ice and bar machines, stoves, refrigerators, freezers, electrical, plumbing, and sewer work as well as changing table tops for gaming tables on the casino vessel. (Tr. 68-72). Ms. Bazor testified about Claimant's work at Avondale, where he supervised installation and wiring of slot machines and purchase of related supplies.

Ms. Bazor described at length the problems Claimant faced in being unable to hire enough qualified employees because of low pay scales and the difficulties in getting supplies on time requiring in some case 2 to 3 days for delivery. In addition, she testified about job pressures: (1) to cut corners which he refused to do; (2) to meet time schedules, causing him to utilize maintenance and housekeeping personnel to do Avondale work of cleaning the casino vessel, install and wire slot machines. (Tr. 75-79). Claimant became so obsessed with the job that he stopped eating, lost weight and worked excessive 12 hour days, 7 days per week prior to his stroke frequently going back to the jobsite late at night to check on work.(Tr. 80-84).

Ms. Bazor described an argument her husband had with Avondale superintendent, Octave Rainey, just prior to his stroke, in which Claimant defended his men's work and the wire they had used in the slot machine hook up and told Rainey not to "jump his people." Reynold Gaspard told Ms. Bazor about the argument while he (Gaspard) was in the West Jefferson ICU immediately following Claimant's stroke. According to Ms. Bazor, Gaspard described the argument as quite heated. She also described other arguments that Claimant had with Avondale personnel, involving the wearing of steel toe shoes resulting in the temporary removal of

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[4] Claimant was terminated on August 13, 1994 because of his inability to return to work after 30 leave of absence. (CX-8)

[5] Claimant's tax returns from 1990 to 1994 show earnings between $31,844 (1994) and $36,250 in 1991. (CX-1).

Employer personnel from the casino vessel. (Tr. 85-87, 186). [6]

C. Testimony of Delores Bazor McNutt, Delaina Bazor Moreau, and Quincy Wade Moreau:

Daughter, Delores Bazor McNutt, (McNutt), testified that prior to her father's stroke he had been working long hours which prevented her from seeing him except for a few hours apparently on July 3 and then on July 4, 1994. During the week of July 4, 1994, Claimant did not stay at his home, but rather lived with his daughter, Delaina Bazor Moreau, (Moreau), because of her close proximity to the jobsite. McNutt confirmed her father's dedication to family and perfectionist work tendencies and the stress it caused because of his inability to get qualified employees. She was also present when Gaspard relayed the argument between Octave Rainey and her father. (Tr. 28-39).

Moreau testified that her father stayed with her two nights a week, when initially hired, but following the July 4 holiday began staying there every night so that he worked longer hours. According to Moreau, her father would leave for work at 6:00 a.m. and return at 6:30 p.m., only to go back to work again to check on night crew work. Moreau testified that her father was preoccupied with running behind schedule and complained about headaches, but refused to seek medical attention. (Tr. 41-47).[7]

Quincy Wade Moreau,(Quincy Moreau), Claimant's son in law , testified about Claimant's devotion to family and work and confirmed Claimant's long work hours leaving home at 6 a.m. and returning at 7 p.m., only to leave again at 8 p.m. and return at 11 p.m. Quincy Moreau testified that Claimant was concerned about not being able to meet job deadlines because Avondale was behind schedule. (Tr. 49-52).

D. Testimony of Peter J. Banks:

Maintenance supervisor, Peter J. Banks, (Banks), who was hired by Bazor in June 1994 and later replaced Claimant when he suffered a stroke on July 13, 1994, provided first hand knowledge about Claimant's job responsibilities and the pressures he endured during the initial start up of operations. (CX-15, p. 40).[8] As

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[6] Employer objected to Ms. Bazor's testimony as hearsay. I permitted it as information relayed to her by her husband. Subsequent testimony from other witnesses with direct knowledge confirmed Ms. Bazor's testimony.

[7] Ms. Bazor confirmed the fact that Claimant when initially hired spent 1 to 2 days a week with daughter Delaina. After July 4, 1994, Claimant never came home staying instead with Delaina and her family. (Tr. 99.100).

[8] Banks placed the date of his hire in May 1994 when in fact it was June 1994. (CX-20, p.6). Banks was hired about June 16 or 2days before Claimant hired Bob Creighton. (CX-20. p

a maintenance supervisor, Banks testified that he was initially hired to perform all facility maintenance including buildings, tent, warehouses and offices, grounds and casino vessel. This included routine maintenance such as changing light bulbs, replacing door knobs and making sure the air conditioning was functioning properly. Claimant was required to get 3 separate bids or prices on maintenance supplies before being allowed to purchase such supplies. (CX-20, pp. 7-14, 47-49).

Concerning the casino vessel, Banks was responsible with Claimant for running wire and setting up slot machines, and making sure the air conditioning was running properly on the casino vessel. Claimant had a check list of maintenance items that he and Banks would go over daily and resolve to make sure he casino vessel would function properly. Claimant and Banks were responsible for supervising a maintenance crew of Somtop "Tip" Pichakron, Reynold Gaspard, Gill Thompson, Jim Mantie, who worked on the casino vessel installing and wiring up slot machines. (CX-18-20).

Claimant and Banks were initially responsible for all casino vessel maintenance which required both men to spend considerable time learning vessel schematics. The only vessel maintenance not initially assigned to Claimant and Banks was the steering, navigation and power trains. Both Claimant and Banks were responsible for vessel plumbing, electrical, refrigeration and lighting. About 5 to 6 days after Claimant's stroke, Employer brought in an outside contractor and maritime crew, (West Bank River Boat Services), to perform vessel maintenance except for replacing gaming tables carpets and stalls, painting, wallpapering which Employer left to its maintenance staff. (CX-20, pp.8, 59-62, 69, 73-74; Tr. 111).

Banks confirmed Ms. Bazor testimony about disputes between Claimant and Octave Rainey. Banks testified that Claimant had frequent arguments with Rainey concerning the method of pulling wire and the supposed need to work Claimant's crew up to 15 hours per day, which Claimant refused. (CX-20, pp.21-23, 68, 69). Banks also confirmed the pressures Employer, (Russell Chatelain), placed on Claimant by: (1) making him secure multiple bids and purchase orders which delayed receipt of necessary supplies, (CX-20, pp. 24-27; (2) not allowing Claimant to purchase the right tools and equipment, (CX-20, pp. 43-46, 53); (3) not allowing Claimant the ability to hire enough qualified personnel, (CX-20, pp. 30-33, 64, 65; and (4) imposing additional assignments such as forming and running a transportation department. (CX-20, pp. 28, 29).

Banks described Claimant as a man under considerable stress to accomplish all assign tasks on a timely basis, who often complained of headaches and worked considerable hours. (CX-20. pp. 36, 38, 67). In addition to these pressures, Claimant and Banks ran into frequent air conditioning problems, especially in the tent which was hard to cool, plus maintenance problems on the bulkhead and casino vessel gangplank which had to be rebuilt. (CX.20, pp. 51-58).

E. Testimony of Somtop (Tip) Pichakron

Somtop "Tip" Pichakron, (Tip), testified that he was hired in either June or July 1994 as a maintenance engineer for the air conditioning system on both the casino vessel and the land facilities. (CX-21, pp 6-8). His initial assignment involved the casino vessel stationed in Avondale's Westwego shipyards where he was assigned to run data lines from the slot machines to the vessel computers. Tip described problems with Octave

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20; CX-15, p. 5).

Rainey, trying to give him orders and the pressure Claimant was placed under prior to his stroke to complete work on schedule. It was because of such pressure that Tip declined Claimant's job when offered it following Claimant's stroke. Tip also confirmed the fact that he and other maintenance crew personnel were working 10 to 12 hour days, 6 to 7 days a week prior to Claimant's stroke. (CX-21, pp. 9-32).

F. Testimony of Russell Chatelain

Russell Chatelain's, Employer's director of purchasing since October 15, 1994, testimony dealt with casino operations and Claimant's duties. (Tr. 108). According to Chatelain, Claimant was hired to be Employer's eventual facilities director. Claimant was responsible for starting up the maintenance and housekeeping department, hiring the necessary personnel to commence commercial operations. (Tr. 109). When Claimant was hired the dock and main office building were under construction as was the boat or casino vessel. Vessel maintenance operations were eventually assigned to an outside contractor, West Bank River Boat Services, (Tr.111). Prior to completion of the dock and office building by independent contractor, Grimaldi, in December, 1994, Employer used a tent located in a parking lot area about 50 feet from where the boat eventually docked to hold casino patrons prior to vessel loading and discharge. (Tr. 112,113).

Chatelain admitted that it was not unusual for department heads to make requisitions for supplies which were in turn denied because of lack of funds. (Tr. 110, 111, 115, 116). Chatelain confirmed Claimant's maintenance and housekeeping responsibilities as well as his work on the casino vessel prior to delivery. (Tr. 117-125). Chatelain also admitted that Avondale was responsible for poor workmanship and late delivery of the casino vessel resulting in substantial loss of revenues, which in turn created a pressure filled and stressful atmosphere. (Tr. 126-129).

Chatelain described the operations and supervisory structure as previously noted as well as the stroke incident wherein security guard, John Dicken, reported Claimant's collapse followed by Employer's head of security, Jack Lott calling for an ambulance which took Claimant to West Jefferson Hospital. (CX-18, CX-17).[9]

G. Testimony of Robert Allen Creighton:

Robert Allen Creighton, (Creighton), who was hired by Claimant as housekeeping manager on June 20, 1994, and eventually in late 1995 became facilities director, testified about his duties which included housekeeping duties both on land shore and marine facilities including the casino vessel. Creighton described his role with Claimant in removing trash from the vessel while under construction at Avondale's Shipyard and Claimant's work in running wire for vessel computers and slot machines confirming the fact that Claimant prior to his stroke worked up to 60 hours per week. (Tr. 131,134-137).

Creighton confirmed Claimant's job of hiring personnel and the fact that Avondale was behind on boat

[9] CX-17 contains the deposition of security guard, John Ronald Dicken, who reported Claimant's stroke and the tent area where Claimant was found unconscious.

construction which required Employer to help install wires and clean the vessel prior to delivery. However, Creighton, unlike Chatelain and Banks, denied the existence of job stress associated with construction delays or the lack of materials or equipment. (Tr. 133, 138, 139, 155). Creighton did confirm however, Claimant's complaints about headaches and his maintenance department's duties on the vessel limited to minor repairs such as changing table tops, and carpeting with all major repairs being performed by West Bank River Boat Services. (Tr. 135, 154; CX-15, pp. 24, 25).[10]

H. Testimony of Reynold Joseph Gaspard:

Reynold Joseph Gaspard, who was hired as a maintenance man by Claimant in June 1994 and currently is Employer's Maintenance Manager, testified that he was initially assigned to run wire on the casino vessel while it was still under construction at Avondale's Shipyard. (Tr. 160-164). Gaspard admitted that material did not arrive on time, but contended it did not affect his work and that he was under no pressure to get the job done on time. (Tr. 165, 167). However, Gaspard did admit working up to 12 hours per day with 4 other employees prior to Claimant's stroke, and the fact that Claimant complained of headaches while working long hours. (Tr. 168, 176, 177).

When questioned about Claimant's arguments with Octave Rainey, Gaspard admitted that Rainey openly doubted the work capabilities of Claimant and his crew, but denied witnessing any argument between Claimant and Rainey and could not remember telling Ms. Bazor about arguments between Rainey and Claimant. (Tr. 177-179).

I. Shannon Williams Blue:

Shannon Williams Blue, (Blue), a senior claims representative for Carrier testified that she was the claims representative responsible for handling Claimant's file and that she never received copies of medical bills or medical reports concerning Claimant's stroke and subsequent treatment. Blue testified that she requested, but never received such information from Claimant's counsel, Lloyd Frischhertz. (Tr. 181, 182).

On cross Blue admitted however, that she understood that when Ms. Bazor filed this claim for compensation on November 28, 1994, Claimant had sustained a cerebral vascular accident, (CVA), which left him comatose and in need of hospitalization . (Tr. 182, 183). The claim, EX-2, noted not only the nature of the injury, (cerebral vascular accident), but the cause, (pressure in getting casino vessel ready for operation) and subsequent treatment at West Jefferson Hospital and Greenery Neurological Rehabilitation Center in Slidell..[11]

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[10] As noted previously Claimant's maintenance duties were not limited to minor maintenance, but rather included all vessel maintenance with the exception of steering, navigation and power trains.

[11] EX-4 contained detailed medical records for Claimant's treatment at West Jefferson Hospital immediately following his stroke.

Blue further admitted not reviewing her file before testifying and being unable to recall the date she requested medical information from Frischhertz ,and also being unable to recall any details from an informal conference, wherein she allegedly requested medical records from Claimant's trial counsel, Marcus Pilewort. (Tr. 184, 185).

J. Medical testimony of Dr. C.B. Scrignar:

Dr. Chester Bruno Scrignar, (Scrignar), a psychiatrist and professor in clinical psychiatry at Tulane University School of Medicine testified as an expert in trauma, stroke and stress cases and clearly identified stress as a causative factor in cardiovascular disease, hypertension, and strokes injuries. Dr. Scrignar testified that stress caused elevated heart rates, blood pressure, headaches and weigh loss and forms the genesis of cerebral vascular accident. (CX-19, pp. 21,22, 30-35).

Dr. Scrignar performed a psychological autopsy of Claimant to determine the psychiatric and psychological factors contributing to his death by reviewing the medical records and gathering information from Claimant's family and coworkers. Dr. Scrignar found Claimant to be a very conscientious, well liked and loved person who put pressure on himself and was subjected to job stressors associated with his work with Employer including long hours of work, time constraints, inability to delegate responsibilities, limited resource. (Tr.23-28). Dr. Scrignar described Claimant as having a Type A personality, i.e., a person who puts stress on self, and a person who suffered from chronic, unrelenting work stress that contributed to his aneurism. (CX-19, pp.,52, 53, 59, 60, 65, 70). The stress was manifest by anorexia and muscle tension headaches. (CX-19 pp. 46-50).

Dr. Scrignar testified that Claimant was subjected to excessive responsibilities at work without the necessary help which combined with a natural conscientiousness which eventually led to or contributed to his stroke. (CX-19, pp. 64,65).

K. Medical testimony of Dr. David Tong:

Dr. David Tong, an assistant professor of neurology at Stanford Medical Center, testified that stress could cause a stroke, i.e., persistent of acute stress could cause elevated blood pressure which in turn could cause an aneurism to burst (CX-22, pp. 7-11). Dr. Tong after reviewing Claimant's medical records, testified that Claimant suffered a subarachnoid hemorrhage or rupture of two brain aneurysms which eventually led to his death and that working conditions as verified by family and coworkers produced considerable stress contributing to the hemorrhage. (CX-22, pp. 11-13). Dr. Tong further testified that a one time event was not likely to lead to a stroke, but stress of short or long duration contributed to it, and that hypertension doubled or tripled Claimant's likelihood of a stroke which was further doubled by Claimant's smoking. (CX-22, pp. 18-21).

IV. DISCUSSION

A. Contention of the Parties:

Concerning jurisdiction or coverage, Claimant's Counsel contends that Claimant's work satisfied both the situs and status requires of Section 903 of the Act and in support thereof sites the following cases: (Situs) Texports Stevedore Co. v. Winchester**,** 63 F.2d 504 (5th Cir. 1980); Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 433 (4th Cir. 1970); Odem Construction Co. Inc., v. United States Department of Labor 622 F.2d 110, 113 (5th Cir. 1980); Cooper v. Offshore Pipelines International, Inc., 33 BRBS 46 (1999); (Status) P.C. Pfeiffer Co., v. Ford, 444 U.S. 69 at 77 (1979); Northeast Marine Terminal Co., v. Caputo, 432 U.S. 249 (1977); Trotti & Thompson v. Crawford, 631 F.2d 1214 (5th Cir. 1980); Sanders v. Alabama Dry Dock and Shipbuilding Co., 841 F.2d 1085 (11th Cir. 1988); Hullinghorst Industries Inc., v. Carrol, 650 F.2d 750 (5th Cir. 1981); McKay v. Bay City Marine, Inc., 23 BRBS 332 (1990). Counsel argues that Claimant clearly worked in an adjoining area customarily used by Employer in the loading, unloading, repair and building of its casino vessel, i.e., a tent area 50 feet from the vessel gang plank, Avondale's Westwego Shipbuilding facility. Further, Claimant's regular duties involved the repair and maintenance of the casino vessel and the fact that he was injured while either standing or sitting inside a tent should not detract from his overall maritime employment status, for employee status can be based either upon the nature of the activity at time of injury or upon the maritime nature of Claimant's employment as a whole. Hullinghorst Industries, supra, at 754.

Employer's counsel argues that Claimant lacks the necessary: (1) situs since the injury did not occur over navigable waters, but rather in a tent over one hundred feet from the Harvey Canal with no connection to maritime commerce; and, (2) status since casino employees are employees of a recreational facility and exempt from coverage under Section 902(3)(B) of the Act lacking a substantial nexus to maritime commerce. Arnest v. Mississippi River Boat .Ltd., 29 BRBS 423 (ALJ) 1995 and Peters v. Roy Anderson Building Corp., 29 BRBS 437 (ALJ) (1995). Counsel contends that Claimant's work on the Casino vessel was done solely in furtherance of the gambling enterprise and had nothing to do with the construction or operation of the vessel and was merely "gratuitous performance" of work "to expedite delivery of the vessel."

Concerning causation Claimant's counsel argues that Section 920(a) creates a presumption that Claimant's disabling condition was casually related to his employment and that in order to invoke the presumption, Claimant must prove that he suffered a harm and that conditions existed at work which could have caused, aggravated or accelerated the condition. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191(1990). Counsel contends that there is no question that Claimant suffered an injury while at work and that Employer offered no evidence to rebut the presumption as required by James v. Pate Stevedoring Co., 22 BRBS 271 (1989). Further, Employer failed to rebut the testimony of Drs. Tong and Scrignar directly linking work related stress to Claimant's stroke thereby convincingly establishing causation.

Employer's counsel invokes Director, OWCP v. Greenwich Collieries, 114 S. Ct. 2252 (1994) arguing that factual doubts, when evenly balanced by evidence, cannot be decided in Claimant's favor and that Claimant failed to prove the second factor of Kelaita v. Triple A. Machine Shop, 13 BRBS 326 (1981), i. e., that conditions existed at work which could have caused Claimant's stroke. Phillips v. Union Texas Petroleum, 27 BRBS 625 (ALJ) (1994); Oargeron v Mack Groves, Inc., 30 BRBS 423 (ALJ)(1996); Dvale v. Department of the Army, 30 BRBS 528 (ALJ) (1996).

Concerning the payment of medical costs, Claimant's counsel contends that Employer is responsible for Claimant's extensive medical costs and funeral expenses which are the natural and unavoidable result of his work injury, and that Employer has a continuing obligation to pay an injured employee's medical expenses. 33 U.S.C. § 907; Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979); Strachan Shipping Co., v. Hollis, 460 F.2d 1108 (5th Cir. 1972). Further, Employer was aware of Claimant's injury on July 13, 1994 and received a claim for compensation filed on November 28, 1994, followed by a notice of controversion filed on December 13, 1994. Section 907(d) is not applicable, since Intervenor and not Claimant, is seeking reimbursement for medical expenses. Claimant filed a claim for benefits on November 28, 1994, which Employer rejected. Claimant's initial treatment was emergency treatment for which there was no time to first obtain Employer's authorization. Employer had an obligation to investigate Claimant's treatment knowing that it might be liable for such and is imputed with knowledge of his treatment. See Harris v. Sun Shipbuilding & Dry Dock Co., 6 BRBS 4 94 (1977); rev'd on other grounds sub nom: Aetna Life Insurance Co., v. Harris, 578 F. 2d 52 (3rd Cir. 1978). Further, Intervenor has no right to reimbursement from the first monies Claimant may receive as compensation since medical expense awards are independent from money received by Claimant under Section 8 or 9 of the Act. Intervenor may recover for medical cost only from Employer. See Union Stevedoring Corp., v. Norton, 98 F.2d 1012(3rd Cir. 1938).

Employer's counsel argues that intervention was untimely since it was not filed until November, 1999, with Intervenor providing no medical bills until time of trial to either Claimant or carrier, in violation of 33 U.S.C. 907 and 20 C.F.R. § 702.421 which requires carrier to be provided with ongoing medical reports, thus preventing carrier from determining the necessity, character or sufficiency of the treatment furnished to Claimant or the opportunity to contest the reasonableness of the charges, i.e., whether the charges exceeded the prevailing charges within the community for the same or similar services.

Intervenor's counsel states that Intervenor paid Claimant's medical bills although its plan expressly exclude coverage for work related accidents after it learned that Carrier denied liability for Claimant's on the job injury. Intervenor asserts that it intervened to protect its subrogation right against Carrier as provided for in its health plan, and further it is entitled to a first lien on any recovery by Claimant including compensation payments. Aetna Life Ins. Co., v. Harris, 578 F. 2d 52 (3rd Cir. 1978); E.P. Paul Co., v. Director, OWCP, 999 F. 2d 1341, 1351(9th Cir. 1993); Mijangos v. Avondale Shipyards, 19 BRBS 15(1986); Janusviewicz v. Son Shipbuilding & Dry Dock Co., 677 F.2d 286, 292 (3rd Cir. 1982); Sunbeam-Oster Co. Group Benefit Plan v. Whitehurst, 102 F.3d 1368 (5th Cir. 1996); Walker v. Wal-Mart Stores, Inc., 159 F.3d 938, 940 (5th Cir 1998); Barnes v. Independent Automobile Dealers Ass'n of California Health & Welfare Benefit Plan, 64 F.3d 1389, 1394 (9th Cir. 1995); Health Cost Controls, Inc. v. Isbell, 139 F.3d 1070 (6th Cir. 1997); Ryan v. Federal Express Corp., 78 F.3d 123 (3rd Cir. 1996); United Mc Gill v. Stinnett, 154 F.3d 168,173 (4th Cir. 1998); Blue Cross & Blue Shield of Alabama v. Sanders, 138 F. 3d 1347, 1355 (11th Cir. 1998); Zeller v. UNUM Life Insurance Company, 1997 WL 732420 (E.D. La. 1997) aff'd 161 F.3d 8 (5th Cir 1998).

Counsel for Intervenor also asserts that Section 907(d) of the Act does not bar its right to recover its lien because Employer had ample notice of claimant's injury and even advised Ms. Bazor to pursue health coverage benefits with Intervenor. Base Billeting Fund, Laughlin Air Force Base v. Hernandez, 588 F.22d 173, 177-178 (5th Cir. 1979); Roger's Terminal & Shipping Corp., v. Office of Worker's Comp., 784 F.2d 687, 694 (5th Cir. 1986); cert. denied, 107 S. Ct. 101(1986); Nardella v. Campbell Machine, 525 F.2d 46, 50-51(9th Cir. 1975). Further, Employer/Carrier failed to show that any treatment received was unnecessary or unrelated to Claimant's work injury, or that it had been harmed by strict compliance with Section 907 (d) and further, that I have the discretion in the interest of justice to excuse a failure of claimant's treating physician to file reports within the 10 day period specified in Section 907(d). Eikel v. Voris, 101 F. Supp. 963(D.C. Tex.

1951), aff'd, 200 F.2d 724, reversed on other grounds, 346 U.S. 328; Shahady v. Atlas Tile & Marble Co., 682 F.2d 968, 970 (D.C. Cir. 1982), cert. denied, 103 S. Ct. 786(1983); Plappert v. Marine Corps Exchange, 31 BRBS 13(1997); Buckaults v. Shippers Stevedore Co., 2 BRBS 277, 280(1975).

B. Credibility of Witnesses:

It is well-settled that in arriving at a decision in this matter, the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, *reh. denied*, 391 U.S. 929 (1968); Todd Shipyards Corporation v. Donovan, 300 F.2d 741(5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co., v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981).

It has been consistently held that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc., v. Britton, 377 F.2d 144 (D.C. Cir. 1967). The United States Supreme Court has determined, however, that the "true doubt" rule which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556 (d) and that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S. Ct. 2251(1994), *aff'g* 990 F.2d 730(3rd Cir. 1993).

In this case, I was impressed with the testimony of Banks, who was the maintenance supervisor under Claimant and later replaced him as facilities director and Chatelain, director of purchasing, as well as family members (Ms. Bazor, Delores Bazor McNutt, Delaina Bazor Moreau and Quincy Wade Moreau), fellow employee Somtop "Tip" Pichakron and Drs. Scrignar and Tong. On the other hand, I was not impressed with Blue who was a totally unprepared witnesses, nor was I impressed with Gaspard who denied job pressures that were admittedly present and was unable to recall arguments between Rainey and Claimant which were verified by Banks, and to some extent verified by Gaspard's admission of Rainey's open criticism of Claimant and his staff's competence.

C. Jurisdiction or Coverage Under the Act:

Following the 1972 Amendments to the Act, an injured party seeking coverage must satisfy both a status and a situs test. See Northeast Marine Terminal Co.,supra 432 U.S. 249, 264-65, 97 S. Ct. 2348, 2357(1977); Herb's Welding, Inc. v. Gray, 470 U.S. 416, 105 S. Ct. 1421, 1423(1985). The status requirement for coverage under the Act is established in 33 U.S.C. § 902(3):

> The term "employee" means any person engaged in maritime employment, including a longshoreman or other person engaged in longshoring activities, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, ...

The Supreme Court stated that a claimant satisfies the status requirement for coverage if he spends "at

least some of his time engaged in indisputably covered activities." Caputo, supra. This language was strictly interpreted by the Fifth Circuit in Boudloche v. Howard Trucking Co., Inc., 632 F.2d 1346(5th Cir. 1980), where that court specifically rejected the "substantial portion" requirement in holding that 2½ to 5 percent of the claimant's time spent loading and unloading was satisfactory. Id. at 1347. Recently, in McGoey v. Chiquita Brands International, 30 BRBS 237(1997), the Board held that the Administrative Law Judge's finding that claimant spent 3 to 5 percent of his time in a covered activity alone was enough to invoke coverage under Caputo and Boudloche, citing Ferguson v. Southern States Cooperative, 27 BRBS 16(1993).

Even more recently, in Lewis v. Sunnen Crane Service, Inc., 31 BRBS 34 (1997), the Board stated that the determination of whether an employee spends "some of his time in covered work" is not dependent on mathematical percentages. Rather, the key factor is the nature of the work to which the claimant could be assigned. Id. at 40. The Board went on to recognize that while at some point work is so episodic or momentary that the claimant will not be covered, that point is yet to be defined. Id. The First Circuit has defined "episodic" to be those activities which are "discretionary or extraordinary", as opposed to those which are "a regular portion of the overall tasks to which [claimant] could be assigned." Levins v. Benefits Review Board, 724 F.2d 4, 8, 16 BRBS 23, 33 (CRT) (1st Cir. 1984). It was this definition which was relied upon by the Board in both McGoey and Lewis. Further, activities cannot be said to be "discretionary or extraordinary"merely because they occur infrequently. McGoey, 30 BRBS at 239, *see also* Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994). It is not the overall frequency with which Claimant performed the activity which is controlling. *See* McGoey, 30 BRBS at 239. Rather, it is whether the covered activity is one which is regularly performed as a portion of the overall tasks which Claimant is assigned which makes the ultimate determination. *See* Boudloche, 632 F.2d at 1348; McGoey, 30 BRBS at 239, *citing* Levins, 724 F.2d 4,16 BRBS 24 (CRT) (1st Cir. 1984).

In this case, Claimant's status can be judged either by the nature of the activity at the time of injury or upon his employment as a whole. Hullinghorst Industries, supra, at 754. Since the record does not reveal the nature of his activity in the tent at time of injury, I must look to his overall employment. On that issue, the record is clear that prior to his injury, he spent a substantial portion of his time in the outfitting and cleaning the casino vessel. In addition his duties clearly included all maintenance on the vessel with the exception of the steering, navigation and power train systems. Thus, Claimant had to spend considerable time learning about the vessels design in order to be able to do necessary refrigeration, plumbing, electrical and lighting work. Besides the vessel which was clearly required to sail and pass Coast Guard certification, Claimant was responsible for maintenance and repair of the tent and dock area and in fact had supervised the reconstruction of the vessel ramp.

Although Banks' duties were later changed to include only replacement of gaming tables, carpets, and stalls, painting and wallpapering following Claimant's stroke, it is the nature of Claimant's duties while working which determines his status.

I find no merit to Employer's argument that Claimant's duties were solely limited to furtherance of the gambling enterprise constituting merely " gratuitous performance" of work "to expedite delivery of the vessel" and thus lacked a substantial nexus to maritime commerce. Rather, I find that Claimant's work was essentially linked to vessel construction or outfitting which included installation and wiring of gambling equipment and vessel cleaning prior to delivery with subsequent maintenance and repair following delivery and hence had a substantial connection to maritime commerce. In addition, Claimant was responsible for dock and adjoining building and tent maintenance which permitted the loading and unloading of passengers from the vessel. Thus, Claimant met the status requirement of Section 902(3).

The situs requirement for coverage under the Act is set forth at 33 U.S.C. § 903(a):

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

The Board has recently upheld a finding that an employer's entire facility was a maritime situs for the purposes of the Act, as it was adjacent to the Houston shipping channel and was customarily used for loading and unloading. Gavranovic v. Mobile Mining & Minerals, 33 BRBS 1, 4 (1999). In this case, there is no question that the tent and dock area where Claimant worked with the air conditioning system and had his stroke was within 100 feet of the Harvey Canal and constituted the only area where passengers could get on or leave the casino vessel. Thus, under applicable precedent, this area met the situs requirements of the Act. Texports Stevedore Co., supra; Jacksonville Shipyards, supra; Odem Construction Co. Inc., supra.

D. Prima Facie Case, Section 20 (a) presumption and Causation.

To establish a prima facie case for invocation of the Section 20(a) presumption, a claimant must prove that: (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. See, e. g., Noble Drilling Company v. Drake, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. See Gardner v. Bath Iron Works Corp., 11 BRBS 556(1979), aff'd sub nom. Gardner v. Director, OWCP, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. See, e. g., Leone v. Sealand Terminal Corp., 19 BRBS 100(1986).

Once a claimant has carried his burden of establishing the existence of a *prima facie* case, he is entitled to rely on the presumption supplied by Section 20(a) of the Act. This presumption functions to link the harm suffered by Claimant to his employment. Noble Drilling v. Drake, 795 F.2d 478 (5th Cir. 1986); Hampton v. Bethlehem Steel Corp., 24 BRBS 141(1990); Kelaita, 13 BRBS 326 (1981). The Section 20(a) presumption shifts the burden to employer to come forward with substantial countervailing evidence that the injury or harm was not caused by claimant's employment. Brown v. Pacific Dry Dock, 22 BRBS 284(1989). Brennen v. Bethlehem Steel, 7 BRBS 947(1978). Thus, once the presumption applies, the relevant inquiry is whether employer has succeeded in establishing the lack of a causal nexus. Dower v. General Dynamics Corp., 14 BRBS 324(1981). When there has been a work-related accident followed by an inquiry, the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act. Stevens v. Todd Pacific Shipyards Corp., 14 BRBS 626 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984). If employer fails in this attempt, claimant may properly rely on the Section 20(a) presumption to link his injury with his employment. If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Del Vecchio v. Bowers, 296

U.S. 280, 56 S. Ct. 190 (1935); Volpe v. Northeast Marine Terminals, 671 F.2d 297(2d Cir. 1982).

In this case, I find that Claimant clearly showed that he suffered an injury (stroke) while at work and that this injury was directly related to work induced stress associated with unreasonable expectations for boat completion and delivery considering Avondale's poor workmanship and construction delay combined with Claimant's inability to hire sufficient personnel and supplies due to budgetary restraining. Claimant was forced to work long hours and endure further stress associated with interference from Avondale superintendent, Octave Rainey. The unquestioned and credible medical evidence showed that Claimant was subjected to chronic work stress which lead to high blood pressure and eventually the stroke which he suffered on July13,1994.

Employer offered no credible evidence to rebut these facts. To the extent that Creighton or Gaspard denied being under considerable pressure, I discredit such testimony especially in light of Chatelain's admission that Avondale delays and poor workmanship created a stressful atmosphere causing Employer to delay its opening and suffer substantial revenue loss.

Thus, I find that Claimant's work had a direct link and was at least an aggravating factor in the stroke he suffered.

E. Nature and Extent of Injury:

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either nature (permanent or temporary) or extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968); Seidel v. General Dynamics Corp., 22 BRBS 403, 407 (1989); Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached, so that the claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. Hite v. Dresser Guiberson Pumping, 22 BRBS 87, 91(1989); Care v. Washington Metro. Area Transit Authority, 21 BRBS 248 (1988).

An employee is considered permanently disabled if he has any residual disability after reaching MMI. Lozada v. General Dynamics Corp., 903 F.2d 168, 23 BRBS (CRT) (2d Cir. 1990); Sinclair v. United Food & Commercial Workers, 13 BRBS 148 (1989); Trask v. Lockheed Shipbuilding & Construction Co., 17 BRBS 56 (1985). A condition is permanent if Claimant is no longer undergoing treatment with a view toward improving his condition, Leech v. Service Engineering Co., 15 BRBS 18(1982), or if his condition has stabilized. Lusby v. Washington Metropolitan Area Transit Authority, 13 BRBS 446(1981). If the medical evidence indicates that the treating physician anticipates further improvement, unless the improvement is remote or hypothetical, it is not reasonable for a judge to find that MMI has been reached. Dixon v. John J. McMullen & Assoc., 19 BRBS 243, 245(1986); Mills v. Marine Repair Serv., 21 BRBS 115, 117(1988). The mere possibility of surgery does not preclude a finding that a condition is permanent, especially when the employee's recovery or ability is unknown. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202(1986); White v. Exxon Co., 9 BRBS 138, 142(1978), *aff'd mem.*, 617 F.2d 292(5th Cir. 1980).

Furthermore, the Act does not provide standards to distinguish between classifications and degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, Claimant must establish that he can no longer perform his former work due to his job-related injury. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038, 14 BRBS 156(5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); P&M Crane Co. v. Hayes, 930 F.2d 424, 429-30(5th Cir. 1991); SGS Control Serv. v. Director, Office of Worker's Comp. Programs, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. Elliot v. C&P Telephone Co., 16 BRBS 89(1984). The same standard applies whether the claim is for temporary or permanent total disability. If the claimant meets this burden, he is presumed to be totally disabled. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171(1986).

In this case, I find that Claimant's condition never improved from the moment of his stroke in that he failed to regain consciousness. As such, I find that the stroke of July13, 1994 left him permanently and totally disabled.

F. Medical Expenses and Intervenor's Right of Reimbursement:

In general an employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. Perez v. Sea-Land Services, Inc., 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. Colburn v. General Dynamics Corp., 21 BRBS 219, 22(1988); Barbour v. Woodward & Lothrop, Inc., 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. Addison v. Ryan-Walsh Stevedoring Company, 22 BRBS 32, 36(1989); Mayfield v. Atlantic & Gulf Stevedores, 16 BRBS 228 (1984); Dean v. Marine Terminals Corp., 7 BRBS 234(1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. Bulone v. Universal Terminal and Stevedore Corp., 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. Tough v. General Dynamics Corporation, 22 BRBS 356 (1989); Gilliam v. The Western Union Telegraph Co., 8 BRBS 278 (1978).

In Shahady v. Atlas Title & Marble, 13 BRBS 1007 (1981), rev'd on other grounds, 682 F.2d 968 (D.C. Cir. 1982), cert. denied, 459 U.S. 1146, 103 S. Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. Banks v. Bath Iron Works Corp., Iron Works Corp., 22 BRBS 301, 307, 308 (1989); Jackson v. Ingalls Shipbuilding Division, Litto Systems, Inc., 15 BRBS 299(1983); Beynum v. Washington Metropolitan Area Transit Authority, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. Atlantic & Gulf Stevedores, Inc., v. Neuman, 440 F.2d 908(5th Cir. 1971); Matthews v. Jeffboat, Inc., 18 BRBS at 189(1986).

Under Section 7(d)(1), an injured employee cannot receive reimbursement for medical expenses which

he provided payment unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency, refusal, or neglect. 20 C.F.R. § 702.421; Shahady v. Atlas Tile & Marble Co., 682 F.2d 968(D.C. Cir. 1982) *rev'g* 13 BRBS 1007(1981), *cert. denied*, 459 U.S. 1146 (1983); McQuillen v. Horne Bros., Inc., 16 BRBS 10 (1983). The burden of proof regarding compliance with this requirement is on the employee. Maryland Shipbuilding & Drydock Co., v. Jenkins, 594 F.2d 404, 407, 10 BRBS 1, 8(4th Cir. 1979), *rev'g* 6 BRBS 550(1977).

In this case there is no question that Employer was aware of Claimant's stroke and his emergency hospitalization from his initial admission to West Jefferson Hospital on July 13, 1994. Employer declined to cover the medical expenses, but rather, informed Claimant to seek coverage from Intervenor. Where Employer has ample notice of an injury it may not invoke Section 907 of the Act to defeat coverage. Base Billeting Fund, supra, Rogers Terminal, supra, Nardella., supra, Employer should have investigated the issue of Claimant's medical care further. It cannot in good faith claim either claim a lack of notice or an inability to challenge the reasonableness of the charges or services provided, where as in the present case it did made no inquiry into the care provided Claimant. In fact knowledge of Claimant's care is under such circumstances imputed to Employer. See Harris v. Sun Shipbuilding & Dry Dock Co. 6 BRBS 494(1977); rev'd on other grounds sub nom. Aetna Life Inc., Co.,v. Harris, 578 F.2d 52(3rd Cir. 1978).

Regarding Intervenor's right of reimbursement, there again is no question that Intervenor has a right of reimbursement for the medical care and expenses which it provided Claimant because of Employer/Carrier's unlawful refusal to acknowledge and pay for such care. However, Intervenor does not have a first lien or right to reimbursement from the first monies Claimant may receive in this matter for an award of medical expenses is independent of awards under Sections 908 or 909 of the Act. See Union Stevedoring Corp. v. Norton, 98 F.2d 1012,1016-1017(3rd Cir. 1938). Moreover, none of the cases cited by Intervenor in support of first lien rights dealt with subrogation rights in the context of a longshore claim.

G. Death Benefits:

Initially it must be noted that Section 33 U.S.C. § 908 disability benefits must be distinguished from Section 33 U.S.C. § 909 death benefits as two separate causes of action, one for disability lying with the disabled employee, and one for death lying with the specified survivor of the decedent. Henry v. George Hyman Construction Co., 749 F.2d 65, 73(D.C. Cir. 1984).

Section 9 of the Act provides in pertinent part:

> If the injury causes death, the compensation therefore shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:
>
> (a) Reasonable funeral expenses not exceeding $3,000,
> (b) If there be a widow or widower and no child of the deceased to such widow or widower 50 per centum of the average weekly wages of the deceased, during widowhood ....
>
> (e) In computing death benefits, the average weekly wages of the

> deceased shall not be less than the national average weekly wage as prescribed in section 6(b), but —
>
> > (1) the total weekly benefits shall not exceed the lesser of the average weekly wages of the deceased or the benefit which the deceased employee would have been eligible to receive under section 6(b)(1); and
> >
> > (2) in the case of a claim based on death due to an occupational disease for which the time of injury (as determined under section 10(i)) occurs after the employee has retired, the total weekly benefits shall not exceed one fifty-second part of the employee's average annual earnings during the 52-week period preceding retirement.

33 U.S.C. § 909.

A claim for death benefits under the Act is a separate and distinct right from a claim for disability, and such a right does not arise until the death occurs. Puig v. Standard Dredging Corp., 599 F.2d 467, 469(1st Cir. 1979). In such a claim, the time of injury cannot be prior to the employee's date of death. Lynch v. Washington Metro. Area Transit Auth., 22 BRBS 351, 354(1989). Consequently, Claimant's widow is entitled to death benefits pursuant to Section 9 of the Act beginning October 2, 1997 and continuing.

H. Section 14(e) Penalty

Section 14 (e) provides:

> (e) If any installment of compensation payable without an award is not paid within fourteen days after it become due, as provided in subdivision (b) of this section, there shall he added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

In order to avoid this penalty, the Employer must either pay the correct compensation, controvert liability or show irreparable injury. Frisco v. Perini Corp., Marine Div., 14 BRBS 798, 800(1981). Moreover, the assessment of this penalty is mandatory under Section 14(e). An Employer's good faith is not relevant under Section 14 (e). Director , OWCP v. Cooper Assoc., Inc. 607 F. 2d 1385, 1389(D.C. Cir. 1979). In addition, an employer may escape this penalty if it can show that either its failure to make timely payment or file a timely controversion were due to circumstances beyond its control. Gulley v. Ingalls Shipbuilding, 22 BRBS 262, 266 (1989), *aff'd in pert. part sub nom.* Ingalls Shipbuilding v. Director, OWCP, 898 F.2d 1088 (5th Cir. 1990).

In this case Employer, did not controvert until December 13, 1994 which was clearly untimely and failed to provide any justification for such conduct. Claimant is thus entitled to an additional 10 percent

compensation under Section 14(e) on all installment benefits not timely paid prior to the December 13, 1994 controversion.

I. Interest and Attorney Fees:

Claimant is entitled to an award of interest on all benefits outstanding. Strachan Shipping Co. v. Wedemeyer, 452 F.2d 1225(5th Cir. 1971), *cert. denied*, 406 U.S. 958(1972); Grant v. Portland Stevedoring Co., 16 BRBS 267(1984), *on recon.*, 17 BRBS 20(1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 28 of the Act and implementing Code of Federal Regulations Section 702.132 provide for approval of attorney's fees. Claimant's counsel is hereby allowed thirty (30) days from the date of service of this decision to supplement his present application and submit the application for attorney's fees. A service sheet showing that service has been made on all parties, including Employer, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and the record in its entirety, I enter the following Order:

1. Employer/Carrier shall pay Claimant's widow compensation for Claimant's permanent total disability from July 13, 1994 to October 1, 1997 based on Claimant's average weekly wage of $653.85 in accordance with the provisions of Section 908(a) of the Act.

2. Employer/Carrier shall pay Claimant's widow the annual compensation benefit increase pursuant to Section 910(f) of the Act effective July 13, 1994, for the applicable period of permanent total disability.

3. Employer/Carrier is liable for a penalty assessment under Section 914(e) of the Act on all installment benefits not timely paid prior to its December 13, 1994 controversion.

4. Employer/Carrier shall pay Claimant's widow funeral expenses and death benefits from the date of Claimant's death on October 2, 1994, to present and continuing pursuant to Section 909 of the Act.

5. Employer/Carrier shall reimburse Intervenor for all reasonable and necessary medical

expenses it paid on behalf of Claimant as a result of his July 13, 1994 stroke in the amount of $606,306.64.

6. Employer/Carrier shall pay Claimant's widow interest on any accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgement in accordance with 28 U.S.C. §1961.

7. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

ORDERED this 4th day of May, 2000, at Metairie, Louisiana.

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CLEMENT J. KENNINGTON
Administrative Law Judge